Supreme Court, U.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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NO. 75-1700

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DR. SCOTT SMART,

Petitioner

V.

TEXAS POWER AND LIGHT COMPANY, ET AL,

Respondents

* * *

REPLY OF RESPONDENT THE STATE OF TEXAS TO THE PETITION FOR WRIT OF CERTIORARI

* * *

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The State of Texas was granted leave to intervene in this cause by the United States District Court for the Northern District of Texas for the purpose of preserving and defending the constitutionality of Texas statutes the Petitioner sought to have declared unconstitutional. Petitioner has challenged the constitutionality of Articles 3264 *et. seq.* of the Texas Civil Statutes, which provide the procedure for exercise of the power of eminent domain in Texas and Article 1436 of the Texas Civil Statutes, which delegates to gas and electric utility companies operating in Texas the authority to exercise the power of eminent domain. The State of Texas retains its interest in this aspect of the litigation because the Petition for Writ of Certiorari seeks review of the decision of the Court of Appeals for the Fifth Circuit denying Petitioner's standing to maintain his action challenging the enumerated State statutes.

QUESTION PRESENTED

It is respectfully suggested that the question presented for review herein is whether the Court of Appeals correctly affirmed the District Court's dismissal of Petitioner's suit on the ground that he lacked standing to maintain a federal action challenging the validity of an eminent domain proceeding pending in State District Court.

STATEMENT OF THE CASE

The eminent domain proceeding involving Petitioner's property is currently pending in the 199th Judicial District Court of Collin County, Texas. At the time the proceeding was initiated before Special Commissioners on September 1, 1970, public documents showed that Petitioner's brother, Dr. Don Smart, a resident of Texas, held title to the property. The Petition for Condemnation recognized Dr. Don Smart as owner. Petitioner, Dr. Scott Smart, was not in physical possession of the property at the time, nor does he now claim to have been in possession. Instead, Petitioner claims that in 1969 he received by unrecorded deed an undivided one-quarter interest in the property from Dr. Don Smart. With record title in the name of Don Smart when the condemnation action was instituted, full property interests became subject to the proceeding, including Petitioner's interest. Petitioner first recorded instruments showing the property interest he had received from his brother on March 27, 1973, over two years after the proceeding was commenced. Petitioner has not sought to intervene in the State proceeding.

Texas Power and Light Company, condemnor, presently is in possession of the property in question by virtue of Article 3268, Texas Revised Civil Statutes, which permits a condemnor to take possession of

condemned land pending litigation upon payment to the landowner of the award against condemnor or deposit of the same amount in court subject to order of Defendant. The award was paid by Texas Power and Light Company, and withdrawn by Dr. Don Smart, Petitioner's brother. An appeal of the award to the State Court kept the proceeding alive. Jurisdiction over the property interests remains with the State Court.

ARGUMENT AND AUTHORITIES

Respondent agrees with the federal courts below that Petitioner lacks standing to initiate and maintain this litigation in federal court. Petitioner inaccurately depicts the lower court decisions as unauthorized exercises in federal court abstention. Instead, the courts correctly held that Petitioner's standing in this suit must be predicated on a right to take part in the State condemnation proceedings and, because Respondent (condemnor), Texas Power and Light, did not have notice of Petitioner's interest in the property until over two years after the commencement of the condemnation proceedings, Petitioner had no such legal right.

In addition, Respondent urges that this is not a suit in which this Court should exercise its right of review by Writ of Certiorari. The question of Petitioner's standing to take part in the condemnation proceedings is a question of State law. Petitioner has steadfastly refused to attempt to become a party in the appeal presently before the State Court having jurisdiction over the property interests in question and thereby has refused to permit State Court adjudication of the issue. Prosecution of Petitioner's suit in federal court would result in a needless multiplicity of lawsuits.

CONCLUSION

For the reasons set out above, Respondent

respectfully urges this Court to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dudley Fowler, a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of June, A.D. 1976, I have served three (3) copies of the foregoing Reply of Respondent the State of Texas to the Petition for Writ of Certiorari of Dr. Scott Smart by U. S. Mail, postage paid, on the following counsel at the addresses shown:

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J. E. Abernathy and
the Honorable Tom Ryan,
Judge of the 199th Judicial
District Court of Collin County, Texas.

DUDLEY FOWLER
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